United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

74-2283

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2283

DOLORES ANTONUCCI, *et al.*,

Plaintiffs-Appellants,

—against—

ROBINSON & CO., INC., *et al.*,

Defendants.

IVAN KEMPNER, *et al.*,

Plaintiffs-Appellees,

—against—

THE NEW YORK STOCK EXCHANGE, *et al.*,

Defendants.

HERBERT HERZ and LOTHAR HERZ, *et al.*,

Plaintiffs-Appellees,

—against—

OLIVER DE G. VANDERBILT, *et al.*,

Defendants.

ON APPEAL FROM A JUDGMENT AND ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
IN A CONSOLIDATED CASE (70 CIV. 3890;
70 Civ. 4009; 70 Civ. 5005)

BRIEF FOR PLAINTIFFS-APPELLANTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the opinion below contain any explanation for awarding five firms of attorneys the fees they requested, while sharply reducing the fee requested by Rabin & Silverman, who had expended the most hours in the litigation in question?

2. Is there any rational support in the record for awarding fees which are as much as five times the amount awarded to Rabin & Silverman, on an hourly basis, when Rabin & Silverman had concededly "labored assiduously" and assumed the most active role in the litigation?

Statement of the Case

Introduction

This consolidated class action concerns the refusal, in 1970, of the New York Stock Exchange to render financial assistance from its Special Trust Fund to protect customers of Robinson & Co. ("Robinson") and First Devonshire Corporation ("Devonshire"), two member firms who became insolvent. As a result of this litigation, and Congressional pressure, the Exchange reversed its position and agreed to render such assistance.

As part of the settlement of this case, the Exchange agreed to pay a total of $200,000 to all counsel for the various plaintiffs. No fees were to be obtained from class members. This appeal is from an order of District Judge Wyatt apportioning, without explanation, the $200,000 so that Rabin & Silverman, who had done most of the work in the litigation, were awarded a fee at an hourly rate of $44, while other attorneys with substantially less active roles, received requested fees at an hourly rate ranging from approximately twice to five times that amount.

Events Leading Up To The Settlement

In August, 1970, the Exchange announced that it would not assist the customers of Robinson and Devonshire from the assets of the Special Trust Fund. Those firms,

members of the Exchange, were unable to meet their obligations to their customers. The Trust Fund had been set up for just such a contingency. The Exchange had earlier committed itself to assisting the customers of ten other member firms from the Fund (3a, 15a).

Rabin & Silverman, representing appellants herein, commenced a class action (Antonucci) against the Exchange in September, 1970, seeking damages from the Exchange for failing to assist the customers of Robinson as it had assisted customers of other financially troubled member firms (34a). This was the first action of the consolidated actions. Shortly afterwards (49a), Rabin & Silverman commenced a similar class action on behalf of the customers of Devonshire against the Exchange (Goldberg).*

Rabin & Silverman attempted to obtain immediate relief because of the hardship to members of the class; the receivers of Robinson and Devonshire had frozen the accounts of all customers of those firms, and many customers therefore could not reach their life's savings. The collapse of

*Other actions were also commenced against the Exchange on behalf of customers of Robinson, Devonshire and Blair by attorneys representing appellees herein. See table under "The Decision Below."

Robinson and Devonshire was similar to the failure of a bank. Rabin & Silverman also believed that bringing both cases to trial as quickly as possible and exerting maximum litigation pressure on the Exchange would encourage settlement (4a).

Rabin & Silverman expended a total of 822 hours in September, October, November and December, 1970 in active litigation before four judges of this Court on five major motions including motions for preliminary injunctions and class action determination (6a, 7a, 30a-32a).

While litigation was progressing, amid considerable publicity in the news media, the Exchange was pressing in Congress for passage of legislation to protect customers of brokerage firms in financial distress thereby lifting the burden of such protection from the Exchange. The Exchange's posture, vis-a-vis Congress, would be improved and the chances of the remedial legislation being passed would be enhanced, if it agreed to assist all customers of troubled brokers prior to passage of the legislation (9a, 10a).

The Settlement

On or about December 14, 1970, at a meeting called by the Milbank firm at its offices, plaintiffs' counsel in all the cases involved here were informed that the Exchange

wished to settle the cases and would provide assistance to the customers of Devonshire and Robinson on the same basis that it was providing assistance to the other financially troubled brokerage firms (181a). Mr. Pomerantz was present at the meeting as special counsel to Cahn & Ryp who had served the Exchange just two weeks before (52a). The Exchange also indicated that it was willing to pay reasonable legal fees based on the work done by plaintiffs' counsel and not on a percentage of the amounts advanced (10a, 181a). Negotiations ensued between the Exchange and plaintiffs' counsel, including Rabin & Silverman, concerning the amount of the legal fees to be paid, and a figure of $200,000 was agreed upon by both sides by January 4, 1974 (181a).

The Hiring of Mr. Pomerantz

On or about January 4, 1974, after the $200,000 had been agreed to, Mr. Pomerantz suggested to all plaintiffs' counsel that he would shepherd the settlement through to completion for a fee of $60,000 of the $200,000 fee. Cahn & Ryp, Steinhaus & Hochhauser, David L. Wasser and Lane & Lesser agreed to hire Mr. Pomerantz. Rabin & Silverman refused to hire him. Mr. Pomerantz and the four law firms employing him then agreed upon an allocation of the remaining $140,000 and attempted to persuade Mr. Rabin to accept a proposed fee of $33,500. He refused to accept it (181a, 203a).

Thereafter, Mr. Pomerantz commenced his work in overseeing the details of the settlement proposed on December 14, 1970 on behalf of the law firms who had retained him. Rabin & Silverman dealt with the Exchange on behalf of their own clients in working out the details of the settlement. When the time came for submitting a fee application to the Court for approval* Mr. Pomerantz and his clients applied for $167,500 out of the $200,000 based on the agreement rejected by Mr. Rabin.

The Fee Hearing

In July, 1974 a hearing on the fees was held before Judge Wyatt. No evidence was presented. Only oral argument took place, without any court reporter present. At the commencement of the hearing, Mr. Rabin requested permission to speak first since Antonucci was the first action brought. Judge Wyatt responded by stating he had known Mr. Pomerantz for thirty years, was used to him, and wanted to hear him first. During the oral argument Judge Wyatt suggested that the Exchange had settled because they feared Mr. Pomerantz as a litigator.

*The long interval between the proposed settlement on December 14, 1970 and its approval by the Court on June 30, 1971, on the one hand, and the present fee application is due to the fact that the Stipulations of Settlement provided that fees could not be applied for until arrangements under the Bankruptcy Act had been confirmed by the Court for Robinson, Devonshire and Blair. This condition was finally satisfied in 1974.

The papers submitted to Judge Wyatt reflected that Rabin & Silverman had expended 822 hours of lawyers' time prior to the Exchange's settlement offer and 84 hours afterwards, or a total of 906 hours expended, the way in which that time was spent, the lawyers involved, their status (partners or associates), and their normal hourly rate for non-contingent commercial litigation (6a, 7a, 30a, 31a, 32a).

No time records were kept by Cahn & Ryp, the Pomerantz firm, or Lane & Lesser; partial time records were kept by Steinhaus and Hochhauser. The total time estimated by the four law firms was 1,686 hours. There was no specific break-down of the way in which the time was spent (100a, 101a).

The Decision Below

Judge Wyatt awarded substantially the fees requested except for the fees of Rabin & Silverman. In Devonshire fees of $213, $180 and $76 per hour were awarded. He awarded to the Pomerantz firm who had engaged in no litigation $183 per hour. He awarded Mr. Wasser $24 per hour, slightly less than what he asked for.

And he awarded Rabin & Silverman, who had spent more time and had engaged in more active litigation than any other law firm, $44 per hour.

The decision does not explain why Judge Wyatt awarded such widely varying fees to law firms in the same

case or why he chose to reduce Rabin & Silverman's requested fee by nearly two-thirds while accepting in substance the requests of the other law firms. The relevant portion of the decision states only the following (235a):

> "Rabin & Silverman ask for $140,000. In view of the number and amount of the applications and the maximum available, no such sum can be allowed. They will be allowed $40,000, inclusive of disbursements.
>
> The allowances, to include disbursements, will be as follows:

Cahn & Ryp	$31,500
Rabin & Silverman	40,000
Abrahams & Lowenstein	2,500
Blinder & Steinhaus (now Steinhaus & Hochhauser)	31,500
David L. Wasser and Husin, Miller & Levy	20,000
Lane & Lesser	17,000
Pomerantz Levy Haudek & Block	57,500
	$200,000"

The wide disparity among the fees awarded is graphically illustrated below:*

Law Firm and Plaintiff and Broker Involved	Hours Expended	Fee Requested	Fee Awarded	Hourly Rate
Cahn & Ryp Berney (Devonshire)(two cases) Herz (Blair)	175(estimated)	33,500	31,500	180
Steinhaus & Hochhauser Kempner (Devonshire)	148(partially estimated)	33,500	31,500	213
Lane & Lesser Dietz (Devonshire)	225(estimated)	18,500	17,000	76
David L. Wasser Wasser (Robinson) Husin (Devonshire	823	21,500	20,000	24
Pomerantz Levy Haudek & Block (not attorneys of record in any case; retained by four attorneys above)	315(estimated)	60,000	57,500	183
Rabin & Silverman Antonucci (Robinson) Goldberg (Devonshire)	906	140,000**	40,000	44

**On this appeal appellants are claiming that they should have been awarded $92,000 as a fee. See Point II herein.

*Abrahams & Lowenstein who were awarded $2,500 are omitted since they are not involved in this appeal.

POINT I

NEITHER THE DECISION BELOW NOR THE RECORD PROVIDES ANY BASIS FOR THE WIDE DISPARITY IN FEES AWARDED

In Alpine Pharmacy, Inc. v. Chas. Pfizer & Co. Inc.,481 F.2d 1045 (2nd Cir.1973),Judge Wyatt apportioned fees among nine firms of attorneys. He adverted generally to factors which suggested a generous allowance and then to factors suggesting a modest allowance. He then listed the fees awarded, without further discussion, just as he did here. This Court remanded, stating at P.1053 the following:

> "...Under all these circumstances, we do not view the total award as abuse of discretion.
>
> Nevertheless, we are troubled by a related problem - the division of the total award among Committee members. We have been unable to discover, either from Judge Wyatt's opinion or from the record, any rationale to explain the precise distribution adopted. The final awards bear no discernible relationship to those requested, nor does there appear to be any simple correlation, mathematical or otherwise, applicable to the amounts granted the various Committee counsel.
>
> On the rather vague state of the record, we find ourselves unable to deal with the contentions of several of the appellants that the Committee fee distribution is arbitrary and unfairly rewards certain firms.

> Indeed, we find striking the contrast between the sparse discussion below on this point and Judge Wyatt's comprehensive balancing of various relevant factors in arriving at fee awards in the City of Philadelphia case.
>
> * * *
>
> To be sure, many appropriate reasons governing the various distributions come to mind - disparities in hours worked, comparative standing at the bar of lawyers involved, differences in results achieved or types of work done, to name but a few. We cannot accept the suggestion of some appellants that a single precise formulation must be developed and applied unswervingly. But until the district court articulates some basis for distribution of the Committee award, we are left to speculate as to its reasoning. Such speculation is inconsistent with even our limited review role here, so we remand the issue of the Committee fee award to the district court for further consideration and findings consistent with what we have said above."(emphasis added).

Judge Wyatt here did even less than in Alpine since here he did not even indicate in a general way the factors which impelled him to grant all the attorneys substantially what they requested (except for Rabin & Silverman), and to award fees which on an hourly basis are so strikingly disproportionate.

His discussion of the application of Abrahams & Lowenstein in which he states they had little to do with the results obtained and therefore substantially reduces the fee they request, contrasts with the lack of a similar discussion

for Rabin & Silverman's fee application. Judge Wyatt's silence suggests that appellants' efforts, unlike those of Abrahams & Lowenstein, contributed to the result achieved - appellees so concede* - and makes the sharp reduction in the fee requested all the more incomprehensible.

See also Dopp v. Franklin National Bank, 461 F.2d 873, 879, ftn.15(2nd Cir.1972) reversing a preliminary injunction:

> "Findings are not a jurisdictional requirement of appeal, but merely aid the appellate court in reviewing the decision below. In certain cases, however, the absence of findings can so obscure the basis for granting the relief below that reversal is called for on this ground alone." (emphasis added)

The Record

An examination of the record provides no rational basis for the descriminatory treatment of Rabin & Silverman. In fact, the factors mentioned in Alpine which might justify a difference in fees awarded - disparities in hours worked, comparative standing at the bar of lawyers involved, differences in results achieved or types of work done - all point toward allowing the fee requested rather than the reverse.

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*(103a) "In fairness we must say that Mr. Rabin has labored assiduously on behalf of the two classes to which his professional energies were devoted."

More hours were expended by Rabin & Silverman than any other single firm. The disparity is in favor of Rabin & Silverman

Appellants are apparently the only attorneys of record who have had extensive experience in securities class actions (compare 8a with 228a-231a and 220a-221a). Indeed, the relative inexperience of the other attorneys of record herein apparently led them to retain Mr. Pomerantz*.

Appellants engaged in more intensive litigation in this case than any of the other firms. On the other hand, Cahn & Ryp had served their complaints only two weeks prior to the Exchange's offer of settlement; Lane & Lesser served their complaint in this Court after the offer of settlement; Steinhaus & Hochhauser had only filed a class action motion which was subsequently withdrawn; and of course the Pomerantz firm engaged in no litigation. Among other things, appellants made two motions for a preliminary injunction, moved for consolidation, prepared a consolidated complaint, moved for class action determination, appeared before four judges of this Court for argument and conferences (Judges Ryan, Croake, Weinfeld and Wyatt) and served notices

*Appellants do not dispute that Mr. Pomerantz is entitled to a higher hourly rate than they are for the 90 hours he estimates he personally expended on this case. But whatever adjustment is necessary to reflect a higher rate on the 90 hours out of a total of approximately 2,600 lawyers' hours expended, should be paid by those who hired him and in any event, such an adjustment would fall far short of justifying

(continued on next page)

to produce documents and notices of deposition. All of this activity occurred before the Exchange declared its willingness to settle in the middle of December, 1970.

Here too any comparison between the type of work done by the appellants and the appellees is favorable to the former.

Results Achieved

The appellees attempted to justify their application before Judge Wyatt on the basis that of the monies advanced by the Exchange to the three brokers Blair received 75%, Devonshire received 23 1/2% and Robinson received 1 1/2%. Thus,according to appellees, Rabin & Silverman were entitled to, at most, 25% of the $200,000, or $50,000 (103a).

There are a number of difficulties with this approach. First, it does not explain why two firms of attorneys who had nothing to do with Blair, Steinhaus & Hochhauser and Lane & Lesser, involved only in Devonshire, were awarded hourly fees of $213 and $76, nearly five times and two times greater than the hourly fee of Rabin & Silverman, who were involved in the same case. It also does not explain

*(Footnote continued) the $60,000 agreed to by the other law firms for his services and substantially acquiesced in by Judge Wyatt.

why the Pomerantz firm which was hired to oversee the final details of the settlement, on behalf of four law firms, and had nothing to do with the result in Blair, was awarded over four times the hourly fee awarded to Rabin & Silverman.

The result is especially inexplicable when appellees have conceded that Rabin & Silverman "labored assiduously on behalf of the two classes [Devonshire and Robinson] to which [their] professional energies were devoted." Under such circumstances, the wide difference among the fee awards can only be characterized as whimsical.

Further, the record reflects (177a-180a) that the Exchange was always committed to assist Blair customers. It had so stated in its internal memorandums. Congress never questioned the Exchange's commitment. It had paid the salary of Blair's liquidator and his secretary beginning in September, 1970, paid on behalf of Blair a fee of $4,000 to $5,000 weekly to a firm specializing in the processing of customer's complaints commencing in December, 1970, and made an initial payment of $1,000 as evidence of its commitment on September 25, 1970.

The complaint filed by Cahn & Ryp in the Blair case also demonstrates their awareness that the Exchange was

committed to and was assisting Blair. The Blair complaint does not allege non-payment from the Exchange's Special Trust Fund, while the complaint filed by Cahn & Ryp in Devonshire does so allege (see 177a-179a).

Cahn & Ryp can hardly claim credit for the $20,000,000 expended by the Exchange to assist Blair customers when they knew that it was committed to such assistance prior to the institution of their action!

Finally, the unitary fee of $200,000, has no mathematical or other relationship to the amounts ultimately received by members of the class. All parties agreed to and participated in the negotiations respecting the fee on the basis of obtaining fair compensation for work done and time expended. Indeed, that Mr. Pomerantz, a well-known champion of the principle that fees should be based on results achieved rather than time spent, accepted a fee on behalf of his clients of, as he put it-less than 1% of the amount recovered, "perhaps the lowest percentage award in history" (95a)- is strong evidence that work done and not result achieved was the basis for that fee.

In any event the Grinnell case, F.2d (2nd Cir.1974), precludes any award of fees based solely upon the result:

> "The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case."

Judge Moore, in words applicable to this case, explained his Grinnell opinion:

> "It [Grinnell] was not just an architect's rendering of the legal house, if I may say so, but the carpets were on the floor and the picutres on the wall and all the attorneys possibly had to do was move in. I would say this differs, if it is so proven, from the situation with which Mr. Pomerantz is familiar, where his imagination, hard work, experience and skill have built the house from its very foundations." (Transcript of P.L.I Conference on Federal Procedure held in May, 1974, New York City, P.706 (to be published)).

Here, Mr. Pomerantz was presented with an all but completed house on December 14, 1970 when the Exchange agreed to settle. Despite Judge Moore's admonition, he then, moved into the house, claimed title to it, and evicted appellants whose time and effort had helped to build it.

Judge Wyatt's justified recognition of Mr. Pomerantz' skill as a litigator, should not obscure the fact that in this case Mr. Pomerantz displayed none of such skill, because it was not required, and that the decision below grants windfall fees to some attorneys and deprives appellants of fair compensation for "assiduous labors" they have rendered.

POINT II

THE DECISION BELOW SHOULD BE MODIFIED TO AWARD A FEE OF $91,000 TO RABIN & SILVERMAN

Abrahams & Lowenstein has been awarded a fee of $2,500 from which they have taken no appeal and Mr. Wasser has been awarded a fee of $20,000, substantially everything he requested, to which appellants have no objection. There thus remains $177,500 to be allocated. On the basis of the hours expended by Rabin & Silverman, 906, and the total hours for all remaining attorneys, 1769, appellants are entitled to a fee of slightly more than 51% of $177,500 or approximately $91,000 rather than the $40,000 awarded.

Appellants originally applied for a fee of $140,000 on the basis of their estimate that they had done approximately 75% of the work involved. The suggested modification takes into account the hours set forth in appellees' application; it results in an hourly rate of approximately $100., consistent with the $75 rate charged for non-contingent securiries litigation. It is respectfully submitted that the four year wait for fees here and the substantial risk that plaintiffs could not prevail, justifies the modest premium requested.

While Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045 (2nd Cir. 1973) was remanded to Judge Wyatt, for "further consideration and findings" this Court has the power under appropriate circumstances to modify the fee award without a further hearing, as it did in U.S.A. v. American Society of Composers, Authors, and Publishers, 466 F.2d 917 (2nd Cir. 1972). There this Court increased the fee to $100,000 from $50,000.

In Alpine, Judge Wyatt had been literally immersed in the intricacies of complicated anti-trust litigation over a period of years and had familiarity with the work of the lawyers applying for fees. It was therefore appropriate that the case be remanded to him. Here, Judge Wyatt came into the case only to approve a settlement nearly four years ago*. Even that settlement, consisting of 100% of what plaintiffs requested, necessarily did not require any extensive analysis of the merits of the case or the work which had gone before.

Indeed, at the hearing on the fee applications Judge Wyatt frankly conceded that he had very little recollection of the case after the lapse of four years.

Under such circumstances, this Court is in as good a position to evaluate the extensive papers in support of the fees requested as the Court below, and little would be served by remanding.

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*Judge Wyatt also denied Rabin & Silverman's motion for a preliminary injunction in 1970.

The principle is well established in this Circuit that where the evidence is contained largely in documents, as here, and does not involve oral testimony of witnesses, as here, the Appeals Court will assume an active role in modifying the findings of the lower court, if warranted.

In Dopp v. Franklin National Bank, 461 F.2d 873 (2nd Cir. 1972), a preliminary injunction was vacated, the Court noting the following in words applicable to this case:

> "Our dissenting brother is quick to point out that the district judge's findings 'are not to be disturbed unless found to be clearly erroneous." This is not a case, however, where there was an evidentiary hearing below and the credibility of witnesses played an essential part in the district judge's determinations. We are in as good a position as the district judge to read and interpret the pleadings, affidavits and depositions and thus have broader discretion on review."

The same principle was espoused in Severi v. Seneca Coal & Iron Corp., 381 F.2d 482 (2nd Cir. 1967):

> "The district court arrived at its conclusions by a reliance on the inferences it drew from this voluminous correspondence and the undisputed facts agreed to by the parties in their pre-trial stipulation and as we are in precisely the same position we have no hesitancy in drawing different inferences and reaching a contrary result."

Accordingly, this Court should modify the order below to award a fee of $91,000 to Rabin & Silverman.

Conclusion

The order should be modified to award a fee of $91,000 to Rabin & Silverman. In the alternative, the action should be remanded to Judge Wyatt with appropriate standards for his guidance.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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OLIVER DE G. VANDERBILT, et al.,

Defendants.

----------x

STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

MONROE ROSEN being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at

On December 6, 1974 deponent served the within PLAINTIFFS-APPELLANTS BRIEF upon Cahn & Ryp, 101 Park Avenue, N.Y.C., Abrahams & Lowenstein, 100 South Broad Street, Philadelphia, Pennsylvania, Steinhaus & Hochhauser, 655 Madison Avenue, N.Y.C., David L. Wasser, 250 West 57th Street, N.Y.C., Lane & Lesser, 92 Fulton Street, N.Y.C. and Pomerantz, Levy, Haudek & Block, 295 Madison Avenue, N.Y.C., attorneys for Plaintiffs-Appellees in this action, by depositing two true

copies of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Monroe Rosen

Sworn to before me
December 6, 1974

Milton C. Winkler

MILTON C. WINKLER
Notary Public, State of New York
No. 31-9704765
Qualified in New York County
Commission Expires March 30, 1976